

From: Aisen, Alex M.
To: 'Microsoft.atr(a)usdoj.gov'
Date: 1/28/02 1:33pm
Subject: Microsoft Settlement

Attached please find my comments, as an individual, on the proposed Microsoft settlement.

-Alex M. Aisen

<<comments on MS.rtf>>

CC: Aisen, Alex M.

Comments on Microsoft Settlement

Alex M. Aisen

I am writing these comments as a consumer, professional, and computer user. I am an academic physician, not an attorney, and readily admit I do not know the formal rules for a submission such as this. I believe the comments I am making are accurate, but much of what I write is based on what I have read and remember, but have not verified personally. I am writing as an individual only, and not as a representative of my employer.

My position is that Microsoft is a company that has produced, and continues to produce much excellent software. But they often behave in ways which seriously harm both consumers and competitors, and this behavior is likely to get substantially worse if the proposed settlement is approved without substantial modifications. Like many others, I believe the settlement is far too lenient. The best way to encourage Microsoft to continue to produce top quality software in a way which truly benefits consumers is to ensure that there is competition, and to demonstrate to the company that if they behave in an illegal manner, they will be punished in a meaningful way. The proposed settlement does neither, and should be substantially strengthened.

Here is my list of many of the harmful behaviors I believe Microsoft to be guilty of. Some of these practices may be illegal; most are likely within the law. But it is clear that the only reason Microsoft has been able to get away with things such as I will mention is that they are a monopoly; their customers, be they corporate or individual, often have no practical choice but to play by their rules, onerous as they often are.

Anticompetitive Activities. The activities outlined in the lawsuit several years ago by Caldera Corporation over the computer operating system DR-DOS, wherein Microsoft was alleged to have (and probably did) incorporate well camouflaged code in a version of Windows released to software developers that deliberately "broke" a competitor's product (DR-DOS, which at the time competed with Microsoft's MS-DOS) is an excellent example. This lawsuit was settled by Microsoft for a substantial sum.

More recently, Microsoft has released a new version of Internet Explorer, version 6, which, unlike previous versions, is deliberately incompatible with plug-ins (third party accessory software) written in the so-called Netscape style. This deliberate incompatibility may be an attempt designed to further hurt their competitor, Netscape

They have also removed support for up-to-date versions of the Java Programming language from the latest version of Windows, Windows XP. Java is a programming language developed by Sun Microsystems, that has been widely adopted by many software developers; it has the important virtue of being cross-platform. That is, programs written in Java can usually run on computer platforms other than Windows, for example the Macintosh, Unix, and Linux. By removing full support that Microsoft provided in earlier versions of Windows, Microsoft is hurting both developers who choose to use Java, and consumers such as myself who bought Java based software from these developers.

Though I certainly cannot prove it, as a long time users of many Microsoft products, I think is possible or even likely that the company has sometimes introduced or permitted "glitches" in their software that interfere with competing products, but not with Microsoft's own. For example, in the past the Novell Corporation has produced a file sharing system that competed with Microsoft servers, allowing desktop PC's to store computer files and share printers via centralized server computers. I have found that there are numerous "glitches" when using Novell file servers, that seem not to be present when using Microsoft file servers. As a user, I have no real way of knowing whether these glitches are simply bugs or weaknesses in Novell's software code, or "deliberate" incompatibilities hidden in the desktop versions of Windows by Microsoft. And even if there is no overt action by Microsoft, the fact that Windows software is proprietary, and the source code generally secret, can make it hard for competitors to produce products that interoperate with Windows.

More recently, I personally found that I could no longer use a popular third party e-mail client, Eudora, with an enterprise Microsoft Exchange e-mail server. Microsoft had included, as an option, what I've read is a proprietary security feature called "secure password authentication." The enterprise had apparently started requiring that this protocol be supported by the client software. Since Eudora could not use this, I was forced to switch to a Microsoft program, Outlook Express. Now, Outlook Express, like Internet Explorer is presently a free program. And, I have insufficient technical information to determine what caused this particular incompatibility. However, I cannot help but wonder if this is part of a larger strategy to marginalize third party e-mail clients like Eudora, and whether or not Outlook Express will remain free if and when the competition is gone.

Microsoft's treatment of potential competitors is important as well. An excellent example of the sort of thing they are capable of was recently described in the Wall Street Journal, concerning Eastman Kodak. Film-based photography is now being replaced by digital photography, and Kodak hoped to sell digital cameras and software, which consumers would install on their Windows-based computers. However, this was a market Microsoft wished to enter, either directly or through partners. So Microsoft reportedly designed new versions of Windows to steer consumers away from Kodak's offering, and to those supported by Microsoft. Ultimately, Microsoft backed down in this particular case. But one cannot help but wonder if, given a less powerful adversary than Kodak, or the absence of the ongoing legal activities, if the outcome might have been different.

One additional example: the default home page on standard installations of Internet Explorer (which is part of every copy of Windows and hence part of most PC's sold) is the Microsoft Network. Thus, every time most consumers starts Internet Explorer, the web site they first see is Microsoft's own Microsoft Network. Now, it is possible to change the default home page, but most users either will not know how, or will not bother. So, this simple strategy puts other vendors of web portals at an extraordinary disadvantage.

It has been widely reported that in pre-release versions of Windows XP, Microsoft incorporated a feature called "smart tags" which would allow them to direct users of the Internet Explorer web browser visiting just about any third party web sites to be "directed" at proprietary sites run by Microsoft or its corporate partners. When word of this feature was reported in the news (the Wall Street Journal), there was an outcry, and Microsoft disabled it. However, there is no reason why they could not activate it in the future, particularly if they feel their dominant position in the market place, and the lack of effective oversight, allows them to do so.

Onerous Licensing Terms: Terms in Microsoft software licenses are often onerous, and it seems self-evident that the only reason Microsoft gets away with including them is that they are a monopoly. These onerous terms affect both consumers and businesses.

Two recently publicized examples from consumer software are as follows. The EULA (end user license agreement) found in the download of Microsoft's very popular Windows Media Player, states "Digital Rights Management (Security). You agree that in order to protect the integrity of content and software protected by digital rights management ("Secure Content"), Microsoft may provide security related updates to the OS Components that will be automatically downloaded onto your computer. These security related updates may disable your ability to copy and/or play Secure Content and use other software on your computer. If we provide such a security update, we will use reasonable efforts to post notices on a web site explaining the update."

In other words, Microsoft reserves the right to automatically install software, without the users knowledge or permission, which may disable "other software" on the user's computer. Microsoft's newest operating system, Windows XP, incorporates an automatic update feature, which could easily be used in this manner. Though the putative purpose of disabling software is to enforce Microsoft's interpretation of digital copyright enforcement, it is important to note that the language quoted above is very general; further, even properly intentioned disabling of software could have very adverse unintentional effects on an unsuspecting computer user, as has already been reported in the trade press concerned the automatic updates that occur with XP.

The second example on onerous licensing terms is this language, which speaks for itself, which has been widely reported to be present in the printed EULA included with shrink-wrapped boxes of Microsoft's popular website authoring program, FrontPage: "You may not use the Software in connection with any site that disparages Microsoft, MSN, MSNBC, Expedia, or their products or services, infringe any intellectual property or other rights of these parties, violate any state, federal or international law, or promote racism, hatred or pornography."

At the enterprise level, I have heard, and had limited experience with myself, licensing clauses that do such things as forbid companies from sharing performance test results performed on Microsoft software. Thus, companies can, and sometimes are,

forbidden from sharing their experiences with Microsoft products with their corporate colleagues. Microsoft is even widely reported to have used such language to prevent the publication of comparative reviews of their products.

Cost is an important factor as well. As Microsoft's monopoly in both operating systems and office productivity software has become entrenched, Microsoft uses its licensing terms to effectively raise prices substantially. For example, years ago, when there were competitors to Microsoft Office, the licensing terms on Office allowed concurrent user licensing. This is no longer allowed. More recently, other changes in its licensing terms require users to pay substantially more, oftentimes several-fold more, for software licenses. The important point is, I think, that Microsoft has substantially increased the cost of its software to enterprise consumers over the years, and they often do this by changing the licensing terms, rather than "overtly" increasing the price. The effect is the same – the price goes up dramatically – but the approach used by Microsoft may allow them to masquerade this fact.

Finally, it is well known that Microsoft often include licensing terms and pricing strategies that pressure companies into making upgrades that they otherwise would not, thereby incurring substantial expenses in training, dealing with incompatibilities with other software, reduced efficiency from complex features that may not be needed, etc. Again, this is a practice that cannot practically be regulated; rather it is essential that there be viable competition to Microsoft to keep their licensing practices reasonable.

Privacy. It is clear that Microsoft often uses its monopoly power in ways that seriously compromise privacy. The major reason Microsoft is able to do this, is that they are an effective monopoly. Several examples of such privacy invasion follow.

Several years ago, it was discovered by a third party that all documents created by the then current version of Microsoft's ubiquitous Office software included a unique identifier that allowed the document to be tied to the system that first created it. Further, it appeared that Microsoft had a database of computer registrations that may have allowed this identifier to be tied to the actual individual who registered or purchased the computer. In other words, any letter created in Word could, with access to MS corporate databases, be tied to the computer, and perhaps even the individual who first wrote it. When this was publicized, Microsoft removed the "feature." But, had this occurred today, with their position even more entrenched, they may not have felt this necessary.

It is worth considering the privacy implications of Microsoft's latest operating system XP. XP incorporates functions that have serious privacy implications. Consider two features a user encounters when first installing or using Windows XP, Product Activation, and Passport. Product Activation is now required of the latest consumer versions of Windows and Office, and requires that users contact Microsoft after purchasing, but before they can use the software (to be precise, they are given a short time of use before product activation is necessary). During this contact, which will usually take place over the Internet, information about the users computer is transferred to Microsoft. The stated purpose of Product Activation is as an antipiracy measure, but

the privacy implications are serious. Users have no choice but to send Microsoft information about their computer configuration; the nature of the information they send is not fully known, since the data sent is encrypted, and since Product Activation is a somewhat mysterious and proprietary process.

There are even more serious privacy implications in the MS Passport system. Use of Passport is not theoretically required, as is product activation, but in practical terms most individual users will have to sign on to it. When a newly purchased computer is first turned on, the user is asked multiple times to sign up for Passport. Further, participation in Password is required to obtain technical support from Microsoft; as everyone who has used modern software knows, the need for technical support is inevitable. Passport is designed as a system to electronic commerce, and requires that a user provide significant personal information. One cannot help but be concerned about the collection of such information by a corporation with the ambitions and dominance of Microsoft. Again, viable competition and a robust marketplace would be the best means of ensuring that Product Activation and Passport not be used in ways that violate reasonable user privacy.

Software Reliability: Software reliability, or, rather, the lack thereof, has become a major economic drain in this country. As computers become more ubiquitous, there are important safety concerns as well. It is important to note that the financial motivations for software vendors are not necessarily to produce a reliable product. Companies often charge fees for providing technical support, and indeed, this may be a substantial source of revenue. This revenue stream is enhanced the more complex and "buggy" software is. Microsoft's consumer products used to come with free technical support; as the company's dominance has increased, they have discontinued this practice; they now generally charge consumers for technical support after a limited number of incidents that are "free" (or, rather, included in the price of the software). Corporations are on the hook for far greater fees, with large annual support contracts and per incident fees. And, because Microsoft's software is proprietary, the company is usually the only feasible source of technical support. The way to ensure that commercially sold software is made as reliable as possible is by competition in the marketplace.

(It is noteworthy that, because software is licensed and not purchased, that the usual remedies in the civil courts for "buggy" products do not generally apply to software. This may grow even more true if the software industry, lead by Microsoft, is successful in persuading state legislatures to pass UCITA (Uniform Computer Information Transactions Act), which many feel will effectively eliminate any legal liability for bug ridden software.)

In summary, Microsoft is a great company that has produced many wonderful and useful products. However, there are many ways in which Microsoft's business practices harm consumers, both individual and corporate, as well as competitors. Were Microsoft not a monopoly, the marketplace would be the best policeman. But the company is a monopoly, and has been found by the court to become one through illegal means. It has demonstrated, and continues to demonstrate, a disdain for the legal system that should

give us all pause. The solution must be to impose financial penalties, restrictions on conduct, and perhaps even structural changes on the firm that will restore competition and bring things back in to balance. The proposed settlement does not even come close to meeting this end; it is essential for the long-term health of the American economy that the court remedy this unfortunate situation.